

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**LINDA NITSCH**

Claimant

VS.

**WINDSOR PLACE AT HOME CARE**

Respondent

AND

**KANSAS HEALTH CARE ASSOCIATION**

Insurance Carrier

Docket No. 1,004,751

**ORDER**

Claimant requested review of the December 18, 2003 Award by Administrative Law Judge (ALJ) Jon L. Frobish. On March 9, 2004 the Appeals Board (Board) placed this matter on the summary docket for disposition without oral argument.

**APPEARANCES**

William L. Phalen, of Pittsburg, Kansas, appeared for the claimant. Kip A Kubin, of Kansas City, Missouri, appeared for respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

The ALJ concluded claimant did not sustain any permanent impairment as a result of her compensable injury that occurred on March 27, 2002.

The claimant requests review of the ALJ's Award. She maintains that her pre-existing degenerative hip condition was aggravated by the March 27, 2002 accident. Claimant also alleges her back was injured as well, leaving her with a combined permanent impairment of 24 percent to the body as a whole.

Respondent contends the ALJ's findings are well supported by the record and the Award should be affirmed in all respects.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs, the Board finds the ALJ's Award should be affirmed.

Claimant sustained a compensable injury on March 27, 2002, when she was struck in the right thigh and hip area by the end of a sofa. Respondent provided treatment through Dr. Atkins in Yates Center, Kansas and later with Dr. Chillal, the company physician, both of whom treated her conservatively with medication. Claimant was diagnosed with underlying severe degenerative joint disk disease in her right hip. There is no evidence that claimant expressed any physical complaints about her back or her right upper extremity during this period of medical treatment. Following an examination by Dr. Kevin Komes, who ordered a bone scan, claimant was then referred to Dr. Robert Lieurance, a board certified orthopaedic surgeon.

Dr. Lieurance examined claimant on May 30, 2002. During this examination, he noted claimant's complaints to her right thigh and groin area. He also noted some limitation in her movements as well as a limp while walking. Dr. Lieurance diagnosed a bruise to her thigh and secondary pain due to arthritis. He released her from further treatment as of May 30, 2002, and assessed a 0 percent permanent impairment as a result of her accident.

Dr. Lieurance testified that "from her description, from what she described to me, was the couch hitting the front of her thigh, and I did not feel that was consistent with the complaints that she had with regard to her hip arthritis."<sup>1</sup> Put another way, he indicated the injury she described was more consistent with a contusion to her thigh rather than a worsening of her hip arthritis.<sup>2</sup> Dr. Lieurance steadfastly maintained that he believed the bulk of claimant's ongoing complaints related to her preexisting degenerative joint disease in the right hip. He conceded that claimant maintained she had an increase in her

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<sup>1</sup> Lieurance Depo. at 36.

<sup>2</sup> *Id.* at 37.

symptoms following the accident.<sup>3</sup> Nonetheless, while he admitted that its medically possible that claimant sustained an aggravation of her preexisting degenerative hip condition, it is clear from his testimony that he does not endorse that opinion.

Interestingly, Dr. Lieurance expressed this opinion without the aid of a significant piece of medical information. Claimant had been receiving treatment from Dr. Virendra C. Patel, who had performed a left hip replacement approximately 2 years before her accident. Dr. Patel's medical records clearly evidence a serious preexisting condition in claimant's right hip. In fact, on March 26, 2002, the day before her work-related accident, she was seen by Dr. Patel. During this visit he documents claimant's complaints that the "pain in her right hip has progressively gotten so bad that she's not able to get around anymore."<sup>4</sup> His office note goes on to state that Claimant is to go ahead and schedule her *right total hip arthroplasty*.<sup>5</sup>

Claimant does not deny she had previous right and left hip problems but she does deny that she was ever told she needed a hip replacement or that she had any limp before her work-related accident.<sup>6</sup> She testified the pain was not disabling before her accident and she "could live with it."<sup>7</sup> This contention stands in stark contrast to the complaints memorialized in Dr. Patel's records.

For whatever reason, these records were not shared with Dr. Lieurance in advance of his evaluation. They were presented to him during cross examination and were the focus of an objection lodged on the part of claimant's counsel. The Board finds that although Dr. Patel did not testify, it was acceptable during cross examination to utilize these medical records for purposes of documenting physical complaints, dates of office visits, etc.<sup>8</sup>

Similarly, these same records weren't shared with Dr. Edward J. Prostic in advance of his examination. Dr. Prostic saw claimant on October 1, 2002 and diagnosed post total hip replacement arthroplasty along with significant disk space narrowing and posterior facet arthrosis at L5-S1. He opined that the right hip replacement surgery was related to the March 27, 2002 accident as he believed it aggravated her preexisting degenerative joint

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<sup>3</sup> *Id.* at 36.

<sup>4</sup> *Id.*, Ex. C.

<sup>5</sup> *Id.*

<sup>6</sup> R.H. Trans. at 14-15.

<sup>7</sup> *Id.* at 13.

<sup>8</sup> *Boeing Military Airplane Co. v. Enloe*, 13 Kan. App. 2d 128, 130, 764 P. 2d 462(1988), rev. denied 244 Kan. 736 (1989).

disease, thereby accelerating her need for the hip replacement. He further testified that she aggravated the degenerative joint disease in her low back. Dr. Prostic assigned a 15 percent to the whole body for the right hip as well as an additional 10 percent to the whole body for her lumbar spine. When combined, this yields a 24 percent to the body as a whole under the A.M.A. Guides, 4<sup>th</sup> ed.

Upon cross examination, Dr. Prostic was given the office note of Dr. Patel and asked whether Dr. Patel's findings altered any of his opinions. After reviewing Dr. Patel's office note from March 26, 2002, where he recommends a right hip replacement, Dr. Prostic indicated that his opinion had changed. When asked to elaborate, Dr. Prostic stated "[i]t would indicate that the necessity for the hip replacement was pre-existing disease rather than the reported accident."<sup>9</sup>

After weighing these two physicians' opinions, the ALJ found as follows:

Based upon the treating physician's opinion and the revised opinion of Dr. Prostic upon cross-examination, the Court finds the [c]laimant sustained no additional injury on March 27, 2002, accelerating her need for a hip replacement and the [c]laimant would not be entitled to an impairment rating.<sup>10</sup>

The Board has considered the parties' arguments and the physicians' testimony and, as did the ALJ, concludes claimant sustained no additional permanent impairment as result of her accident. The Board finds that it is not more probably true than not that claimant's right hip condition was permanently worsened as a result of the events of March 27, 2002. Put another way, the claimant failed to meet her burden of proof. Thus, the ALJ's Award is affirmed on this issue.

As for claimant's contention that she is entitled to permanency for complaints to her back which were rated by Dr. Prostic, the Board likewise finds no reason to set aside the ALJ's findings on this issue. Claimant at no time, other than to Dr. Prostic, the physician selected by her attorney for purposes of providing an impairment rating, made any complaints to any of the other physicians who were either treating her or evaluating her. Although she describes limitations in bending and twisting, there is no persuasive evidence to suggest that those complaints bear any causal relationship to the March 27, 2002 accident.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Jon L. Frobish dated December 18, 2003, is affirmed.

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<sup>9</sup> Prostic Depo. at 22.

<sup>10</sup> ALJ Award (Dec. 18, 2003) at 3.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of April, 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: William L. Phalen, Attorney for Claimant  
Kip A Kubin, Attorney for Respondent and its Insurance Carrier  
Jon L. Frobish, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director